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8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Statement of Issues
Against:

Case No. 4217

12 **PINNACLE HEALTH SUPPLY, INC.**
13 **HAIFA BOUTROS, CEO**
14 **7068 Skyway Boulevard**
Paradise, CA 95969
15 **Wholesale License**

STATEMENT OF ISSUES

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold (Complainant) brings this Statement of Issues solely in her official
21 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
- 22 2. On or about May 19, 2011, the Board of Pharmacy, Department of Consumer Affairs
23 received an application for a Wholesale License from Pinnacle Health Supply, Inc., Haifa Boutros
24 (Respondent). On or about May 17, 2011, Haifa Boutros certified under penalty of perjury to the
25 truthfulness of all statements, answers, and representations in the application. George Jamil
26 Boutros submitted a Personal Background Affidavit in which he checked the box for partner.
27 The Board denied the application on May 19, 2011.

JURISDICTION

3. This Statement of Issues is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.3. California Code of Regulations, title 16, section 1770, states:

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare."

4. Section 4302 of the Code states in pertinent part:

The board may deny, suspend, or revoke any license of a corporation where conditions exist in relation to any person holding 10 percent or more of the corporate stock of the corporation, or where conditions exist in relation to any officer or director of the corporation that would constitute grounds for disciplinary action against a licensee.

5. Section 480 of the Code states in pertinent part:

(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(3)(A) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

6. Section 4300 of the Code states:

"(c) The board may refuse a license to any applicant guilty of unprofessional conduct. The board may, in its sole discretion, issue a probationary license to any applicant for a license who is guilty of unprofessional conduct and who has met all other requirements for licensure. The board may issue the license subject to any terms or conditions not contrary to public policy, including, but not limited to, the following:

"(1) Medical or psychiatric evaluation.

"(2) Continuing medical or psychiatric treatment.

"(3) Restriction of type or circumstances of practice.

"(4) Continuing participation in a board-approved rehabilitation program.

1 "(5) Abstention from the use of alcohol or drugs.

2 "(6) Random fluid testing for alcohol or drugs.

3 "(7) Compliance with laws and regulations governing the practice of
4 pharmacy.

5 7. Section 4301 (n) of the Code states in pertinent part:

6 The board shall take action against any holder of a license who is guilty
7 of unprofessional conduct or whose license has been procured by fraud or
8 misrepresentation or issued by mistake. Unprofessional conduct shall include, but is
9 not limited to, any of the following:

10 (n) The revocation, suspension, or other discipline by another state of a
11 license to practice pharmacy, operate a pharmacy, or do any other act for which a
12 license is required by this chapter.

13 8. Section 822 of the Code states:

14 If a licensing agency determines that its licentiate's ability to practice his
15 or her profession safely is impaired because the licentiate is mentally ill, or physically
16 ill affecting competency, the licensing agency may take action by any one of the
17 following methods:

18 (a) Revoking the licentiate's certificate or license.

19 (b) Suspending the licentiate's right to practice.

20 (c) Placing the licentiate on probation.

21 (d) Taking such other action in relation to the licentiate as the licensing
22 agency in its discretion deems proper.

23 The licensing agency shall not reinstate a revoked or suspended
24 certificate or license until it has received competent evidence of the absence or
25 control of the condition which caused its action and until it is satisfied that with due
26 regard for the public health and safety the person's right to practice his or her
27 profession may be safely reinstated.

28 **CAUSE FOR DISCIPLINE**
 (Unprofessional Conduct)

 9. Respondent Pinacle Health Supply is subject to denial under section 480 (a) (3) ,
822, and 4301 (n) for unprofessional conduct in that George Jamil-Elia Boutros, M.D., is listed as
a partner in the application for licensure and he suffers from a mental illness that may affect his
ability to practice as a wholesaler. On or about December 1, 2010, in *George Jamil-Elias vs.*
State Medical Board of Ohio, In the Court of Common Pleas of Franklin County Ohio, General
Division; Case No. 09CV08-12821, said court affirmed the Ohio Medical Board's findings that"

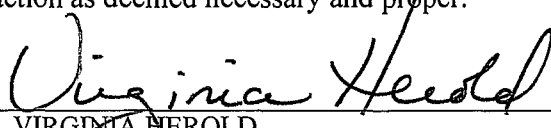
1 Respondent is "[unable] to practice according to acceptable and prevailing standards of care by
2 reason of mental illness or physical illness, including, but not limited to, physical deterioration
3 that adversely affects cognitive, motor, or perceptive skills,' as that language is used in R.C.
4 4731.22 (B) (19) " (A copy of the Decision is attached hereto as Exhibit A and is incorporated
5 herein.)

6 PRAYER

7 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
8 and that following the hearing, the Board of Pharmacy issue a decision:

- 9 1. Denying the application of Pinnacle Health Supply, Inc., Haifa Boutros for a
10 Wholesale License;
11 2. Taking such other and further action as deemed necessary and proper.

12 DATED: 5/25/12


13 VIRGINIA HEROLD
14 Executive Officer
15 Board of Pharmacy
16 Department of Consumer Affairs
17 State of California
18 Complainant

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Exhibit A

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
GENERAL DIVISION

FILED
FRANKLIN COUNTY, OHIO
2010 DEC - 1 AM 10:38

GEORGE JAMIL-ELIAS
BOUTROS, M.D.,

Appellant,

vs.

STATE MEDICAL BOARD OF
OHIO,

Appellee.

CASE NO. 09CVF08-12821

JUDGE BENDER

CLERK OF COURTS
TERMINATION NO: 10
BY: MK
FINAL APPEALABLE ORDER

DECISION AND ENTRY ON MERITS OF REVISED CODE 119.12
ADMINISTRATIVE APPEAL, AFFIRMING ORDER ISSUED
AUGUST 14, 2009 BY STATE MEDICAL BOARD OF OHIO

Issued this 1ST day of DEC 2010.

BENDER, J.

This case is a Revised Code 119.12 administrative appeal, by George Jamil-Elias Boutros, M.D. (Appellant), from an Order that the State Medical Board of Ohio issued on August 14, 2009, imposing conditions for the restoration of Appellant's expired certificate to practice medicine and surgery in Ohio, as well as probationary conditions and reporting requirements. The record that the Board has certified to the Court reflects the following facts, which are undisputed.

I. Facts

Appellant is a 54-year-old ophthalmologist who lives in California. He received his medical degree from the American University of Beirut, Lebanon, in 1980. Appellant then participated in a cataracts-research fellowship for two years in Germany.

In 1982, Appellant immigrated to the United States and, in 1985, completed a three-year residency in ophthalmology at Tulane University, in New Orleans, Louisiana.

From 1985 to 1988, Appellant worked as a locum tenens (temporary) physician at various locations throughout the United States. In 1986, he received his certificate to practice medicine and surgery in Ohio.

From 1988 to 1989, Appellant was employed as an ophthalmologist at the South Williamson Appalachian Regional Hospital in South Williamson, Kentucky. From 1989 to April 1990, Appellant conducted a solo practice in ophthalmology in Iola, Kansas. He then moved to San Diego, California, where he received training in Lasik surgery, with the intention of opening his own Lasik surgery center. That plan did not come to fruition.

In July 2002, Appellant became employed as an ophthalmologist at Trinity Hospital in Minot, North Dakota. From June 2003 to June 2004, with the sponsorship of Trinity Hospital, he completed a retinal-surgery fellowship at St. Michael's Hospital in Toronto, Ontario, Canada. In July 2004, Appellant returned to his employment as an ophthalmologist at Trinity Hospital. In August 2004, Appellant was terminated from that employment.

In September 2004, Appellant was involuntarily committed to the psychiatric unit at Trinity Hospital for three days, based upon a petition alleging that he was a danger to himself or to others. That petition was ultimately dismissed.

On December 17, 2004, Appellant entered into an agreement with the North Dakota Board of Medical Examiners (North Dakota Medical Board), to participate in an evaluation of his mental and physical health at Rush Behavioral Health Center in Oak Park, Illinois (Rush). Appellant agreed that he would not practice medicine until the

North Dakota Medical Board had an opportunity to act on the findings of the Rush evaluation. On December 22, 2004, Appellant reported to Rush and was evaluated by a team of physicians.

On January 2, 2005, the Rush evaluators issued their evaluation of Appellant. They opined, to a reasonable degree of medical and psychiatric certainty, that Appellant's psychiatric history was most consistent with a diagnosis of Bipolar Disorder, Not Otherwise Specified/Rule Out Bipolar Type II. The evaluators opined that, because Appellant's psychiatric condition was chronic and oftentimes progressive, he needed to adhere to certain recommendations. Those recommendations included that Appellant receive treatment from an approved psychiatrist, that he obtain a practice monitor/mentor for at least two years, and that he enter into a contract with a monitoring/advocacy organization of the licensing board in each of the states where he practiced medicine.

On January 27, 2005, Appellant entered into an agreement with the North Dakota Medical Board; pursuant to which he agreed to enroll in that Medical Board's "Physicians Health Program," and pursuant to which that Medical Board agreed that it would not initiate disciplinary action against Appellant, so long as he did not violate the terms of the agreement. Appellant acknowledged in the agreement that he had been diagnosed as having Bipolar Disorder.

In 2005, Appellant worked briefly as an ophthalmologist in Ohio.

In May or June 2005, Appellant began practicing ophthalmology in California.

On July 1, 2005, Appellant failed to renew his Ohio medical license; it was therefore automatically suspended pursuant to R.C. 4731.281(D).¹

At various times, Appellant has held medical licenses in Kentucky, Louisiana, Massachusetts, Michigan, New Hampshire, North Carolina, North Dakota, Washington, and West Virginia, in addition to his California and Ohio licenses.

At the time of the 2007 hearing before the State Medical Board of Ohio, which gave rise to this appeal, Appellant was practicing ophthalmology in California and held only one medical license, in California.

II. Proceedings before the State Medical Board of Ohio

Revised Code 4731.22(B)(19) provides:

§ 4731.22. Grounds for discipline ***

(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills.

*** If the board finds an individual unable to practice because of the reasons set forth in this division, the board shall require the individual to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued, reinstated, or renewed authority to practice. ***

By letter dated February 24, 2005, the State Medical Board of Ohio notified Appellant that, based upon the January 2005 Rush evaluation and other factors detailed in the letter, the Board had reason to believe that Appellant suffered from a mental illness that rendered him unable to practice medicine according to acceptable and

prevailing standards of care, as set forth in R.C. 4731.22(B)(19), and ordered him to submit to a psychiatric evaluation. On March 24, 2005, at the Board's request, Stephen Noffsinger, M.D., a physician who is board-certified in psychiatry and in the subspecialty of forensic psychiatry, conducted a forensic evaluation of Appellant.

By letter dated March 10, 2006, Dr. Noffsinger opined to the Medical Board, to a reasonable degree of medical certainty, that Appellant suffered from Bipolar I Disorder, Most Recent Episode Manic, in Full Remission. Dr. Noffsinger opined that Appellant was presently capable of practicing medicine according to acceptable and prevailing standards of care, so long as appropriate treatment, monitoring, and supervision were put in place. Dr. Noffsinger opined that, due to Appellant's Bipolar I Disorder, he had been unable to practice according to acceptable and prevailing standards of care during a manic episode that he experienced in July, August, and September 2004. Dr. Noffsinger opined that Appellant's Bipolar I Disorder was treatable; but because Appellant was not currently receiving any form of treatment for his disorder, it was Dr. Noffsinger's opinion that Appellant remained at a substantial risk for another mood episode (manic or depressive), which would again make him unable to practice according to acceptable and prevailing standards of care. Dr. Noffsinger recommended that, in order for Appellant to be able to practice according to acceptable and prevailing standards of care, certain restrictions and conditions should be placed on his practice, including that he should receive outpatient psychiatric treatment by a Board-approved psychiatrist, receive a mood-stabilizing medication in order to prevent further mood episodes, periodically have his blood level of mood-stabilizing medication checked to insure continued compliance with his medication, not use illicit substances, and submit to random urine toxicology screens as prescribed by his treating psychiatrist.

In April 2006, Appellant, through counsel, provided additional materials to the Medical Board, which he asserted were pertinent to his evaluation at Rush. The additional materials were provided to Dr. Noffsinger for his review.

By letter dated June 30, 2006, Dr. Noffsinger reported to the Medical Board that the additional materials did not change the diagnosis he made in his March 10, 2006 report, and that the additional materials did not change his recommendations regarding the treatment and monitoring of Appellant's condition.

By letter dated August 9, 2006, the Medical Board notified Appellant:

In accordance with Chapter 119, Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio *** intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

- (1) By letter dated February 24, 2005, the Board notified you of its determination that it had reason to believe that you were in violation of Section 4731.22(B)(19), Ohio Revised Code, and ordered that you submit to a psychiatric evaluation to be conducted by Stephen Noffsinger, M.D. The determination was based upon one or more reasons outlined in such letter, including that you were previously evaluated in or about December 2004, at the request of the North Dakota State Board of Medical Examiners, at Rush Behavioral Health [Rush], a medical center in Oak Park, Illinois; and the evaluators at Rush opined, to a reasonable degree of medical and psychiatric certainty, that your "psychiatric history [was] most consistent with a diagnosis of Bipolar disorder, not otherwise specified/rule out Bipolar type II." The evaluators at Rush further opined that, since your psychiatric condition was chronic and frequently progressive, you needed to adhere to certain recommendations, including that you receive treatment from an approved psychiatrist, obtain a practice monitor/mentor, and enter into a contact [sic] with a monitoring/advocacy organization of the licensing board in the specific states where you practice. You reported to Dr. Noffsinger on or about March 24, 2005, for purposes of the examination.
- (2) By letter dated March 10, 2006, Dr. Noffsinger notified the Board that it was his opinion to a reasonable degree of medical certainty

that you suffer from the mental disorder of Bipolar I Disorder, Most Recent Episode Manic, in Full Remission, and that you were presently capable of practicing medicine according to acceptable and prevailing standards of care, so long as appropriate treatment, monitoring and supervision are put in place. Dr. Noffsinger also opined with reasonable medical certainty that due to your Bipolar I Disorder, you were unable to practice medicine according to acceptable and prevailing standards of care during the manic episode that you experienced in July, August and September 2004. Dr. Noffsinger further determined that your Bipolar I Disorder is amenable to treatment, but because you were not presently receiving any form of treatment for your disorder, it was his opinion with reasonable medical certainty that you remained at a substantial risk for another mood episode (manic or depressive). Dr. Noffsinger further recommended that in order for you to be able to practice medicine according to acceptable and prevailing standards of care, certain restrictions and conditions should be placed on your practice, including that you should receive outpatient psychiatric treatment by a psychiatrist approved by the Board; receive a mood stabilizing medication; periodically have your blood level of mood stabilizing medication checked to insure continued compliance with your medications; not use any illicit substances; and submit to random urine toxicology screens as prescribed by your treating psychiatrist.

On or about April 10, 2006, your attorney provided to the Board additional materials that he asserted, on your behalf, were pertinent to your evaluation at Rush. Said additional materials, as well as other additional pertinent records and documents, were provided to Dr. Noffsinger. By letter dated June 30, 2006, Dr. Noffsinger notified the Board that the additional materials did not change the diagnosis he made in his report dated March 10, 2006, and he further indicated that the additional materials did not change his recommendations regarding treatment and monitoring of your condition.

Your condition as alleged in paragraphs (1) and (2) above, individually and/or collectively, constitutes "[i]nability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that affects cognitive, motor, or perceptive skills," as that clause is used in Section 4731.22(B)(19), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. ***

At Appellant's request, a Hearing Examiner conducted a six-day hearing in May, June and August 2007, on the Medical Board's proposed action against Appellant's Ohio medical license. The State presented the testimony of Dr. Stephen Noffsinger, the psychiatrist who had examined Appellant at the Board's request. Appellant testified and presented the testimony of Shamim Anwar, M.D., Haifa Boutros (Appellant's wife), Madeline Free, M.D., Michael Brinkenhoff, M.D., Jerome Niswonger, M.D., Mark Blackmer, Oscar Pakier, M.D., and Edward Kelly, M.D. Numerous exhibits were admitted into evidence.

As of July 1, 2007, Appellant's Ohio medical license had been expired and therefore suspended for two years pursuant to R.C. 4731.281(D). Pursuant to that statute, in order to practice medicine and surgery in Ohio, Appellant was obligated to apply to have his license restored.

In November 2008, fifteen months after the hearing before the Hearing Examiner concluded, Appellant filed a motion with the Medical Board to admit additional evidence. The Hearing Examiner granted the motion, over the State's objection, and the additional evidence was filed in March 2009.

On July 6, 2009, the Hearing Examiner issued her Report and Recommendation, in which she provided a 102-page summary of the evidence and rendered factual findings and conclusions of law. The Hearing Examiner determined that Appellant's mental illness, specifically Bipolar I Disorder, Most Recent Episode Manic, in Full Remission, as testified to by Dr. Noffsinger, rendered Appellant "[unable] to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely

affects cognitive, motor, or perceptive skills," as that language is used in R.C.

4731.22(B)(19).

The Hearing Examiner recommended that the Medical Board impose certain conditions for the restoration of Appellant's expired medical license, should he ever seek its restoration, and that the Board impose probationary conditions for at least ten years should Appellant's license ever be restored. The Hearing Examiner recommended that, within thirty days of the effective date of the Board's Order, Appellant be required to report the Order to certain entities.

On August 5, 2009, Appellant filed objections to the Hearing Examiner's Report and Recommendation.

The members of the Medical Board reviewed the record and then considered the matter at the Board's August 12, 2009 meeting:

Dr. [Dalsukh] Madia directed the Board's attention to the matter of George Jamil-Elias Boutros, M.D. He advised that objections were filed to Hearing Examiner Davidson's Report and Recommendation and were previously distributed to Board members.

Dr. Madia continued that a request to address the Board has been timely filed on behalf of Dr. Boutros.

Ms. [Sallie] Debolt advised that Dr. Boutros has withdrawn his request to address, as he was unable to attend the meeting due to his recently undergoing surgery.

DR. [ANTA] STEINBURGH MOVED TO APPROVE AND CONFIRM MS. DAVIDSON'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER IN THE MATTER OF GEORGE JAMIL ELIAS BOUTROS, M.D. DR. [DARSHAN] MAHAJAN SECONDED THE MOTION.

Dr. Madia stated that he would now entertain discussion in the above matter.

Dr. [Nandlal] Varyani noted that Dr. Boutros is a practicing ophthalmologist. This case is before the Board because of behavior

problems, as well as problems with his medical practice. Dr. Boutros let his Ohio license expire in 2007 [sic]. Dr. Varyani stated that the Proposed Order notes that the license has expired and has been inactive for more than two years, and indicates that the Board shall not consider restoration of his certificate to practice medicine until certain conditions are met. Dr. Varyani stated that those conditions require psychiatric treatment, which Dr. Boutros is under right now. Dr. Varyani reviewed the other proposed conditions for restoration of Dr. Boutros [sic] license, noting that it's basically boilerplate language. Dr. Varyani stated that because Dr. Boutros isn't present today, he would suggest that the Board just go along with the Proposed Order.

Since Dr. Boutros' license is expired, Dr. [Marchelle] Suppan asked whether it might not be appropriate to table this issue indefinitely, until such time as Dr. Boutros would seek to reapply for license. The Board could let it sit out there in limbo and not do anything with it.

Dr. Steinbergh stated that the Board did cite Dr. Boutros for an inability to practice according to acceptable and prevailing standards due to mental illness. She stated that the record itself is replete with information about Dr. Boutros. Although Dr. Boutros' license has expired, the Board has the obligation and responsibility to take action.

Dr. Steinbergh stated that she agrees with the Conclusion of Law that states that he is unable to practice according to acceptable and prevailing standards. She agrees with the rationale that is in place. If Dr. Boutros wants to practice in Ohio, he will have to reapply. She added that this Order only goes in place if Dr. Boutros decides he'd like to practice in Ohio.

Dr. Steinbergh stated that she did read Dr. Boutros' objections, and she felt that his attorney at this time was just simply developing an appeal to the courts. She thought the objections were very distracting and didn't really go to the case.

Dr. Steinbergh stated that she agrees with the Proposed Order.

Dr. Varyani stated that the only reason he didn't go into detail is because most of the Board have already read this case. He stated that he really likes the Proposed Order because it basically says that if Dr. Boutros applies for restoration of his license, he must meet certain conditions. Dr. Varyani stated that if the Board didn't put conditions on his application for restoration in Ohio, the Board would be leaving him totally uncovered. *Board Minutes, Aug. 12, 2009, pp. 18641 - 18642.*

Following discussion on August 12, 2009, the Medical Board unanimously voted to adopt the Hearing Examiner's Report and Recommendation. The Board concluded that Appellant was unable to practice medicine according to acceptable and prevailing standards of care by reason of mental illness, as set forth in R.C. 4731.22(B)(19). The Board ordered that it would not restore Appellant's expired Ohio medical license unless certain conditions were met, imposed a ten-year probationary period upon Appellant if his license were ever restored, and imposed a "required reporting" directive on Appellant.

Pursuant to the "required reporting" directive, the Board ordered Appellant, within thirty days of the effective date of the Board's Order, to provide a copy of the Board's Order to: (1) all employers or entities with which he was under a contract to provide health-care services or was receiving training, and to the chief of staff at each hospital or health-care center where he had privileges or appointments; (2) the proper licensing authority of any state or jurisdiction in which he currently held any professional license, as well as any federal agency or entity, including but not limited to the Drug Enforcement Agency, through which he currently held any license or certificate; and (3) at the time of application, to the proper licensing authority of any state or jurisdiction in which he applied for any professional license or reinstatement/restoration of any professional license.

On August 14, 2009, the Board mailed a copy of its Order to Appellant. The Order became effective on August 14, 2009.

This appeal followed.

III. Standards of Appellate Review

Revised Code 119.12, which governs this appeal, provides:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

When considering an appeal from an order of the Medical Board, a reviewing court is bound to uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621.

"Reliable" evidence is dependable; that is, it can be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 571. In order to be reliable, there must be a reasonable probability that the evidence is true. *Id.*

"Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.*

In *Farrand v. State Med. Bd. of Ohio* (1949), 151 Ohio St. 222, 224, the Supreme Court of Ohio observed:

*** The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of [persons] equipped with the necessary knowledge and experience pertaining to a particular field. In providing for an appeal from the decision of such a board or commission, the General Assembly did not intend that a court should substitute its judgment for that of the specially created board or commission but did intend to confer a revisory jurisdiction on the court. Otherwise, the section would not have contained the provision, "in the hearing of the appeal the court shall be confined to the record as certified to it by the agency, provided, however, the court may grant a request for

the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency."

The Supreme Court has recognized that the General Assembly has granted to the Medical Board a broad measure of discretion. "When reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and ethical requirements of its profession." *Pons*, 66 Ohio St. 3d at the syllabus. A reviewing court "will not substitute its judgment for the board's where there is some evidence supporting the board's order." *Harris v. Lewis* (1982), 69 Ohio St. 2d 577, 578. "The Board is entitled to rely on its collective expertise in deciding whether there was a violation." *Gelesh v. State Med. Bd. of Ohio*, Franklin App. No. 10AP-169, 2010-Ohio-4378, at ¶39.

IV. Analysis

Appellant's first argument in support of this appeal is that the Medical Board had no statutory authority to impose the "required reporting" directive of its Order on Appellant, inasmuch as his Ohio medical license had expired. This argument is not well taken for the following reasons.

First, the fact that Appellant's Ohio medical license is expired has no effect upon the Board's authority to take disciplinary action against the license. The Medical Practice Act provides that, "Failure by an individual to renew a certificate of registration in accordance with this chapter shall not remove or limit the board's jurisdiction to take any disciplinary action under this section against the individual." R.C. 4731.22(M)(3).

Second, the Medical Practice Act provides that the Board may "limit" an individual's certificate to practice medicine and surgery in Ohio. R.C. 4731.22(B). Although the term "limit" is not defined in the Medical Practice Act, the Tenth Appellate

District has provided guidance on the meaning of the word "limitation" for purposes of the Act.

In *Gross v. Ohio State Med. Bd.*, Franklin App. No. 08AP-437, 2008-Ohio-6826, at ¶¶35-36, the Court of Appeals held:

*** Although the General Assembly did not define "limitation" for purposes of former R.C. 4731.22(B)(22), we cannot conclude that a definitive meaning of this term proves elusive. In *State v. Dorso* (1983), 4 Ohio St. 3d 60, 4 Ohio B. 150, 446 N.E. 2d 449, the Supreme Court of Ohio explained that "[a] legislative body need not define every word it uses in an enactment. *** [A]ny term left undefined by statute is to be accorded its common, everyday meaning. *** 'Words in common use will be construed in their ordinary acceptance and significance and with the meaning commonly attributed to them.'" *Id.* at 62, quoting *Eastman v. State* (1936), 131 Ohio St. 1, 1 N.E. 2d 140, paragraph five of the syllabus, appeal dismissed, 299 U.S. 505, 57 S. Ct. 21, 81 L. Ed. 374. Cf. R.C. 1.42 (providing that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly").

*** The term "limitation" in common usage is characterized by enforceable restrictions imposed upon the scope or exercise of a privilege or power. Thus, in the context of former R.C. 4731.22(B)(22), the term "limitation" reasonably may be construed as referencing an action taken by a medical licensing agency in another jurisdiction that imposed an enforceable restriction upon the scope or exercise of a person's medical license. (Emphasis added.)

Furthermore, the Medical Board has defined the term "limitation" in Ohio Adm. Code 4731-13-36(D), which provides:

4731-13-36. Disciplinary actions.

For purposes of [Chapter] *** 4731, *** of the Revised Code ***:

(D) "Limitation" means to preclude the certificate holder from engaging in a particular conduct or activity, to impose conditions on the manner in which that conduct or activity may be performed, or to require the certificate holder to abide by specific conditions in order to continue practicing medicine. A limitation shall be either temporary or permanent.

By imposing the "required reporting" directive on Appellant, the Medical Board required Appellant to abide by specific conditions in order to resume practicing medicine in Ohio. The Board therefore did "limit" Appellant's Ohio medical license as permitted by R.C. 4731.22(B). The "required reporting" directive is a reasonable restriction imposed by the Board, to ensure that the entities which employ Appellant's services as a physician, or which regulate his practice, are aware of the Board's action and the nature of its action against Appellant. The Court concludes that the Board's "required reporting" directive is in accordance with law.

Appellant's second argument in support of this appeal is that the Medical Board erred in adopting Dr. Noffsinger's expert psychiatric opinion because it was based, in part, on hearsay evidence. The Ohio Rules of Evidence "may be taken into consideration by the board or its hearing examiner in determining the admissibility of evidence, but shall not be controlling." Ohio Adm. Code 4731-13-25(A). Appellant's argument is not well taken.

Appellant's third argument in support of this appeal is that the Medical Board erred in adopting Dr. Noffsinger's expert psychiatric opinion because he was not, in Appellant's estimation, as credible as Appellant's expert psychiatric witness, Dr. Edward Kelly, who disagreed with Dr. Noffsinger's opinion that Appellant had Bipolar I. Disorder, Most Recent Episode Manic, in Full Remission.

With respect to this argument, the Hearing Examiner's observations on the issue of credibility are instructive:

After observing Dr. Boutros over the course of six days of hearing, and giving careful attention to his demeanor during his testimony as well as considering his testimony in the context of all the other evidence, the Hearing Examiner concluded that Dr. Boutros was not a reliable witness

with regard to his disputed behaviors in 2004. *Report and Recommendation*, p. 104.

With regard to the reports of the two expert witnesses, the Hearing Examiner found that both experts (Drs. Kelly and Noffsinger) were qualified to render expert psychiatric opinions. However, both written reports had weaknesses. Some of the information on which Dr. Noffsinger initially relied lacked a firm factual foundation, and he was then obliged to address new information during the hearing. However, on the whole, the Hearing Examiner found Dr. Noffsinger's evaluation and expert opinion to be more reliable and persuasive. Not only was his overall presentation convincing, but, in addition, his assessment of Dr. Boutros' credibility and his assessment of the underlying documentation was consistent with the assessments made by the Hearing Examiner. Much of Dr. Boutros' criticism of Dr. Noffsinger's opinion focused on Dr. Noffsinger's acceptance of reported incidents that Boutros denied happened, or that Dr. Boutros asserted had been misinterpreted. However, the Hearing Examiner did not accept Dr. Boutros' version of these incidents, as explained above. Further, although Dr. Boutros attacked the foundation of Dr. Noffsinger's opinions and his credibility, the Hearing Examiner found Dr. Noffsinger to be a truthful and credible witness, with no improper bias for or against either party. In addition, the Hearing Examiner found that there is a sufficient foundation of factual material in the hearing record to support his opinion regarding medical diagnosis.

Dr. Kelly's evaluation was not found to be persuasive for a variety of reasons. First, in forming his opinions, he accepted statements as true that the Hearing Examiner rejected as unreliable. He also discounted statements that the Hearing Examiner found to be trustworthy. For example, Dr. Kelly accepted as true practically all the statements and descriptions given by Dr. Boutros and his wife, who had hired him, but he rejected the statements of numerous other witnesses because he viewed them as having self-interest and bias. Second, Dr. Kelly relied heavily on statements made to him directly, which the Hearing Examiner did not have the opportunity to review. With regard to the interviews he conducted, there were no written statements, affidavits, or transcripts of the alleged statements of these witnesses. Third, during his testimony, Dr. Kelly was simply not as persuasive and believable as Dr. Noffsinger. Dr. Kelly appeared to be less objective in his approach.

Although the Hearing Examiner found the conclusions and opinions of Dr. Noffsinger to be more persuasive on the whole, it is important for the Board to exercise its own collective medical expertise in determining the appropriate diagnosis based on the evidence and in determining whether Dr. Boutros is unable to practice according to acceptable and prevailing

standards of care by reason of a medical condition unless he receives treatment, monitoring, and supervision. The Board is *not* precluded, as a matter of law, from agreeing with either of the expert witnesses. If the Board finds that the diagnosis reached by Dr. Noffsinger is reliable, based on the evidence and on its own medical expertise, the Board may agree with his diagnosis. Likewise, there is nothing in Dr. Kelly's report and testimony that, as a matter of law, would preclude the Board from relying on his opinion. (Emphasis in original.) *Report and Recommendation*, pp. 108-109.

A hearing examiner, as the finder of fact, may take note of the inconsistencies in the evidence and resolve them accordingly, believing all, part, or none of a witness's testimony. *D'Souza v. State Med. Bd. of Ohio*, Franklin App. No. 09AP-97, 2009-Ohio-6901, at ¶17, discretionary appeal not allowed, 2010-Ohio-2212. In the instant case, the Hearing Examiner provided an impressively thorough, meticulous, and comprehensive recitation of the evidence, took note of the inconsistencies in that evidence, and then resolved those inconsistencies accordingly. Her conclusion was that Dr. Noffsinger was more credible than Dr. Kelly. The Hearing Examiner therefore believed Dr. Noffsinger when he opined, to a reasonable degree of medical probability, that Appellant had Bipolar I Disorder, Most Recent Episode Manic, in Full Remission. The Medical Board did not err in adopting Dr. Noffsinger's expert psychiatric opinion.

Appellant's fourth argument in support of this appeal is that the Medical Board's Order is not supported by reliable, probative, and substantial evidence. For the following reasons, the Court does not agree.

Dr. Noffsinger, an associate professor of psychiatry at the medical school at Case Western Reserve University, testified on behalf of the State at the hearing below. He is board-certified in psychiatry and forensic psychiatry. Since 1996, Dr. Noffsinger has served as the Chief of Forensic Psychiatry at Northcoast Behavioral Healthcare, a psychiatric hospital in Northfield, Ohio. He also provides psychiatric services for the

Cuyahoga County Court of Common Pleas. Dr. Noffsinger's professional background is set forth in detail at pages 22 - 34 of the transcript. He testified as follows:

[By the Assistant Attorney General.]

Q. Dr. Noffsinger, based upon your education, training, experience, evaluation of George Boutros, along with your review of the items which you reviewed in preparing your report, do you have an opinion based upon a reasonable degree of medical probability as to whether or not George Boutros, M.D., has an ability to practice medicine and surgery according to acceptable and prevailing standards of care?

A. Yes, I have an opinion.

Q. And what is your opinion?

A. That so long as he is in treatment and under psychiatric monitoring, Dr. Boutros is able to practice medicine.

Q. And can you opine on what treatment and monitoring would be necessitated in order for Dr. Boutros to practice medicine according to acceptable and prevailing standards?

A. Well, because there is a substantial likelihood that he will have future manic episodes that would impair his ability to practice, he needs to be in treatment with a psychiatrist, qualified psychiatrist, who will be able to evaluate his symptoms, prescribe a mood stabilizing medication which will lower the risk of future manic episodes; and then also be able to monitor him for a return of his symptoms.

So I would recommend again that he have outpatient treatment by qualified psychiatrists every two weeks, to take mood stabilizing medication, that he comply with all medications prescribed by his treating psychiatrist, that if he's taking a mood stabilizer in which we can check blood levels, that he can comply with blood levels to make sure that he's taking the medication and taking them within therapeutic dosage.

He should also authorize a psychiatrist to submit regular updates to the Medical Board about his symptoms and his compliance with treatment, and that should he experience a future manic episode, that he should agree to temporarily suspend his practice due to his symptoms until the manic episode has resolved, and then he should

really not use any kind of substances and be willing to submit to random urine toxicology screens. *Transcript*, pp. 85 - 86.

The State Medical Board of Ohio is authorized to take action against a medical license if the licensee is "[unable] to practice according to acceptable and prevailing standards of care by reason of mental illness[.]" R.C. 4731.22(B)(19). Dr. Noffsinger's testimony constitutes reliable, probative, and substantial evidence that Appellant is unable to practice medicine according to acceptable and prevailing standards of care by reason of mental illness, unless he is in outpatient treatment with a qualified psychiatrist, taking mood-stabilizing medication, and is being monitored by the psychiatrist for the return of his symptoms. The Court "will not substitute its judgment for the board's where there is some evidence supporting the board's order." *Harris v. Lewis*, 69 Ohio St. 2d at 578. In the instant case, there clearly is such evidence.

In addition, the members of the Medical Board were entitled to use their own expertise to conclude that Appellant is impaired by reason of mental illness, as set forth in R.C. 4731.22(B)(19). *Pons*, 66 Ohio St. 3d at the syllabus. The Court will therefore defer to the expertise of the collective Board members in reaching such a conclusion.

Appellant's fifth, and final, argument in support of this appeal is that the Medical Board violated Appellant's due-process rights by posting Dr. Noffsinger's diagnosis of Appellant's condition on the Board's website. This argument is not well taken because R.C. 4731.22(B)(19) provides:

In enforcing this division, the board, upon a showing of a possible violation, may compel any individual authorized to practice by this chapter *** to submit to a mental examination ***. If the board finds an individual unable to practice because of the reasons set forth in this division, the board shall require the individual to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued, reinstated, or renewed authority to practice. An individual affected under this division shall be afforded an

opportunity to demonstrate to the board the ability to resume practice in compliance with acceptable and prevailing standards under the provisions of the individual's certificate. For the purpose of this division, *any individual who *** receives a certificate to practice under this chapter* accepts the privilege of practicing in this state and, by so doing, *shall be deemed* to have given consent to submit to a mental or physical examination when directed to do so in writing by the board, and *to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.* (Emphasis added.)

Dr. Noffsinger's examination and diagnosis of Appellant were not subject to the physician-patient privilege. By its very terms, the physician-patient privilege attaches only to communications made within the physician-patient relationship, that is, communications made relating to the medical treatment of the patient. *In re Banks*, Scioto App. No. 07CA3192, 2008-Ohio-2339, at ¶19. Dr. Noffsinger did not examine Appellant for the purpose of providing medical treatment to Appellant. To the contrary, he examined Appellant for the limited purpose of providing an expert medical opinion to the Medical Board. Accordingly, the physician-patient privilege did not attach to the examination or to Dr. Noffsinger's resulting diagnosis. Furthermore, even if the physician-patient privilege did somehow attach to the examination or the diagnosis, the physician-patient privilege is not a constitutional privacy right. *State v. Desper*, 151 Ohio App. 3d 208, 2002-Ohio-7176, at ¶36, appeal denied, 98 Ohio St. 3d 1540, 2003-Ohio-1946.

Due process requires that a person with a protected interest is entitled to notice and an opportunity to be heard in order to preserve the individual's rights under the due-process clauses of the Ohio and United States Constitutions. *Gelesh*, 2010-Ohio-4378, at ¶18, citing *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314. Appellant was given notice and an opportunity to be heard. His due-process rights were not violated.

V. Conclusion

Upon consideration of the entire record on appeal, the Court finds that the August 14, 2009 Order of the State Medical Board of Ohio, imposing conditions for the restoration of Appellant's expired certificate to practice medicine and surgery in Ohio, as well as probationary conditions and reporting requirements, is supported by reliable, probative, and substantial evidence and is in accordance with law. The Order is therefore **AFFIRMED**.



JUDGE JOHN F. BENDER

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Revised Code 4731.281(D) provides:

*** Failure of any certificate holder to register and comply with this section shall operate automatically to suspend the holder's certificate to practice. *** If the certificate has been suspended pursuant to this division for two years or less, it may be reinstated. The board shall reinstate a certificate to practice suspended for failure to register upon an applicant's submission of a renewal application, the biennial registration fee, and the applicable monetary penalty. *** If the certificate has been suspended pursuant to this division for more than two years, it may be restored. Subject to section 4731.222 of the Revised Code, the board may restore a certificate to practice suspended for failure to register upon an applicant's submission of a restoration application, the biennial registration fee, and the applicable monetary penalty and compliance with sections 4776.01 to 4776.04 of the Revised Code. The board shall not restore to an applicant a certificate to practice unless the board, in its discretion, decides that the results of the criminal records check do not make the applicant ineligible for a certificate issued pursuant to section 4731.14, 4731.56, or 4731.57 of the Revised Code. ***